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8 UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA
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10 ERIC SKANSGAARD,

11 Plaintiff,

12 v.

13 BANK OF AMERICA, N.A., and BAC
HOME LOANS SERVICING, L.P.,

14 Defendants.

15 CASE NO. C11-988 RJB

16 ORDER DENYING MOTION TO
DISMISS

17 This matter comes before the Court on Defendants' motion to dismiss. (Dkt. 7.) The
Court has considered the motion, the response the reply, and all related papers. The Court finds
this matter suitable for decision without oral argument.

18 **INTRODUCTION AND BACKGROUND**

19 Plaintiff Eric Skansgaard is an owner of a home located in Hoquiam, Washington.
20 Complaint ¶ 13. In October 2002, Skansgaard obtained a Federal Housing Administration loan
21 from Eagle Home Mortgage (Eagle) in the amount of \$83,686, to purchase the home. *Id.*
22 Because the property is located in a Special Flood Hazard Area (SFHA) as designated by the
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1 Federal Emergency Management Agency (FEMA), Skansgaard is required by federal law and
2 the terms of his deed of trust to maintain flood insurance on the property. *Id.*; Dkt. 8-1 at 4.

3 For the initial period of the loan, Skansgaard maintained only enough flood insurance to
4 cover the principal balance of the loan, not the replacement value of the land and improvements.
5 Compl. ¶ 17. Eagle never objected to the coverage amount. *Id.* ¶¶ 16-17.) Bank of America
6 purchased Skansgaard's loan, and the mortgage is now serviced by a division of Bank of
7 America, BAC Home Loans Servicing, LP (Defendant or BHLS). *Id.* ¶ 13. BHLS has informed
8 Skansgaard that his flood insurance coverage is not adequate, and that he must have flood
9 insurance equal to the replacement value of the improvements to the property or \$250,000,
10 whichever is the lower amount. *Id.* ¶ 18.) Bank of America allegedly force-placed flood
11 insurance on Plaintiff's property and charged \$799.22 to Plaintiff's escrow account. *Id.* ¶ 20.)
12 Bank of America is alleged to have received a commission for this acquisition of flood
13 insurance. *Id.* ¶ 23.) Plaintiff alleges that Defendants' force placement of insurance has created
14 an escrow shortage and his mortgage payment has "skyrocketed from \$758.46 per month to well
15 over \$900 per month." *Id.* ¶ 21.)

16 In May 2011, Skansgaard filed a complaint in King County Superior Court, claiming that
17 defendants "unfairly, deceptively, and unlawfully required" him to purchase and maintain flood
18 insurance on his property in amounts greater than required by law. Skansgaard also alleges that
19 Defendants have unfairly and unlawfully profited by force-placing flood insurance on his
20 property. On behalf of an alleged class of similarly situated individuals, Skansgaard pursues
21 three claims: (1) breach of contract; (2) breach of the implied covenant of good faith and fair
22 dealing; and, (3) a violation of the Washington Consumer Protection Act ("CPA"). Compl.
23 ¶¶ 35-59. Skansgaard also seeks a declaration that Defendants cannot require flood insurance in
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1 the amount requested and that Defendants breached the contract and violated Washington law by
 2 force-placing flood insurance beyond the required level. *Id.* ¶¶ 60-64. On June 13, 2011,
 3 Defendants removed the case to this Court from King County Superior Court. Dkt. 1-2 at 3.
 4 Defendants have moved to dismiss the complaint. Dkt. 7.

5 **MOTION TO DISMISS STANDARD**

6 A motion to dismiss filed pursuant to Rule 12(b)(6) tests the sufficiency of the complaint.
 7 Conley v. Gibson, 355 U.S. 41, 45-46 (1957). “To survive a motion to dismiss, a complaint must
 8 contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its
 9 face.’” Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009) (quoting Bell Atl. Corp. v. Twombly,
 10 550 U.S. 554, 570 (2007)). The plaintiff must provide “more than labels and conclusions, and a
 11 formulaic recitation of the elements of a cause of action will not do.” Twombly, 550 U.S. at 555.

12 **BREACH OF CONTRACT CLAIM**

13 Contract interpretation is generally a question of law for the Court. See Burg v.
 14 Hudesman, 115 Wn.2d 657, 663 (1990). Under Washington law, Courts “generally give words
 15 in a contract their ordinary, usual, and popular meaning unless the entirety of the agreement
 16 clearly demonstrates a contrary intent.” Hearst Commc’ns, Inc., v. Seattle Times Co., 154
 17 Wn.2d 493, 504 (2005). If the language of a contract is clear and unambiguous, the Court must
 18 “enforce the contract as written; it may not modify the contract or create ambiguity where none
 19 exists.” Lehrer v. State Dep’t of Social & Health Servs., 101 Wn. App. 509, 515 (2000).
 20 “Where the parties’ contractual language is ambiguous, the principal goal of construction is to
 21 search out the parties’ intent.” Jones Assocs., Inc. v. Eastside Props., Inc., 41 Wn. App. 462, 467
 22 (1985). “Language is ambiguous if, on its face, it is fairly susceptible to more than one
 23 reasonable interpretation.” Mendoza v. Rivera-Chavez, 88 Wn. App. 261, 268 (1997) (quotation
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1 and citation omitted). “[A]mbiguous contract language is strictly construed against the drafter.”
 2 Jones Assocs., 41 Wn. App. at 468.

3 The parties dispute whether the deed of trust unambiguously permits Defendants to
 4 require flood insurance in any amount it desires. The deed of trust states:

5 Borrower shall insure all improvements on the Property, whether now in existence or
 6 subsequently erected, against any hazards, casualties, and contingencies, including fire,
 7 for which Lender requires insurance. This insurance shall be maintained in the amounts
 8 and for the periods that Lender requires. Borrower shall also insure all improvements on
 the property, whether now in existence or subsequently erected, against loss by floods to
 the extent required by the Secretary.

9 Dkt. 8-1 at 4. The Secretary refers to the Secretary of HUD. HUD regulations require flood
 10 insurance “in an amount at least equal to either the outstanding balance of the mortgage, less
 11 estimated land costs, or the maximum amount of the NFIP [National Flood Insurance Program]
 12 insurance available with respect to the property improvements, whichever is less.” 24 C.F.R. §
 13 203.16a(c). This is lower than the amount of insurance Defendants require of Plaintiff—the
 14 value of the improvements to the land.

15 The three sentences of the deed of trust are ambiguous as to whether the lender has
 16 discretion to require any amount of flood insurance it desires. The sentences can be construed in
 17 two ways. Defendants urge the Court to read them to mean that any hazard insurance includes
 18 flood insurance, and that the lender has the right to require such insurance to be kept in any
 19 amount it sees fit. This is not the only reasonable reading possible. Plaintiff argues that the third
 20 sentence acts independently of the first two sentences. Plaintiff reads the contract to mean that
 21 the lender may only require the flood insurance be kept in accord with the levels set by the
 22 Secretary, not the full replacement value of the land and any improvements.

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1 Construing the language of the deed of trust in Plaintiff's favor and giving full meaning
 2 to all relevant provisions, Plaintiff has stated a claim for breach of contract. As pleaded, the
 3 complaint adequately alleges that Defendants breached the terms of the deed of trust by requiring
 4 insurance over the agreed levels. Accepting Plaintiff's allegations as true, the deed of trust did
 5 not permit Defendants to set the flood insurance at any other level. Plaintiff has adequately
 6 alleged a breach of contract claim and the motion should be denied as to this claim.

7 **IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING**

8 Defendants argue primarily that the breach of covenant of good faith and fair dealing
 9 claim must be denied because they have not required flood insurance beyond the terms of the
 10 deed of trust. This argument is in issue, and should be rejected as a basis to dismiss Plaintiff's
 11 breach of covenant claim.

12 Defendants also argue that the claim should be dismissed because Plaintiff has not
 13 demonstrated that he was denied the "full benefit of performance" or that Defendants
 14 "interfere[d] with [Plaintiff's] performance." Dkt. 7 at 14.

15 The "implied duty of good faith and fair dealing" in every contract "obligates the parties
 16 to cooperate with each other so that each may obtain the full benefit of performance." Badgett v.
 17 Sec. State Bank, 116 Wn.2d 563, 569 (1991). "Ordinary contract principles require that, where
 18 one party is granted discretion under the terms of the contract, that discretion must be exercised
 19 in good faith-a requirement that includes the duty to exercise the discretion reasonably." Craig
 20 v. Pillsbury Non-Qualified Pension Plan, 458 F.3d 748, 752 (8th Cir. 2006) (applying
 21 Washington law) (quotation omitted). "Good faith limits the authority of a party retaining
 22 discretion to interpret contract terms; it does not provide a blank check for that party to define

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1 || terms however it chooses.” Scribner v. Worldcom, Inc., 249 F.3d 902, 910 (9th Cir. 2001)
2 || (applying Washington law).

3 Plaintiff has sufficiently alleged a claim for breach of the covenant of good faith and fair
4 dealing. Plaintiff alleges Defendants unilaterally decided to require more insurance than was
5 required by the deed of trust. This act allegedly deprived Plaintiff of the full benefit of his
6 bargain. Defendants argue that they only required the amount of insurance FEMA recommends.
7 Whether Defendants action was reasonable is a question of fact that cannot be determined on the
8 motion to dismiss, and does not provide a basis to dismiss the claim as a matter of law. The
9 motion to dismiss this claim should be denied.

CONSUMER PROTECTION ACT

Defendants argue Plaintiff's CPA claim fails because he has not alleged any unfair or deceptive acts that have a capacity to deceive the public, as required by the statute.

To prevail on a private CPA claim, a private plaintiff must show (1) an unfair or deceptive act or practice, (2) that occurs in trade or commerce, (3) a public interest, (4) injury to the plaintiff in his or her business or property, and (5) a causal link between the unfair or deceptive act and the injury suffered. Indoor Billboard/Washington, Inc. v. Integra Telecom of Wash., Inc., 162 Wn.2d 59, 74 (2007). “An unfair or deceptive act or practice need not be intended to deceive—it need only have ‘the capacity to deceive a substantial portion of the public.’” *Id.* at 74-75 (quoting Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778, 785 (1986)).

21 Plaintiff's CPA claim turns on the allegation that Defendants forced Plaintiff to obtain
22 insurance in an amount Plaintiff was not contractually obligated to provide. Plaintiff also alleges
23 Defendants received monetary kick-backs from this action. These allegations suggest

1 Defendants acted deceptively to impose an obligation that was not legally required and from
2 which they benefitted financially. This conduct is sufficiently alleged to have the capacity to
3 deceive a substantial portion of the public. The motion to dismiss Plaintiff's CPA claim should
4 be denied.

5 **CONCLUSION**

6 Therefore, it is hereby **ORDERED**:

7 Defendants' Motion to Dismiss (Dkt. 7) is **DENIED**. Plaintiff's claims may proceed.

8 Defendants' Motion to Stay Discovery (Dkt. 25) is **DENIED** as **MOOT**.

9 Dated this 13th day of October, 2011.

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12 ROBERT J. BRYAN
United States District Judge

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